IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 92 of 1987

For Approval and Signature:

HONOURABLE MS. JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMBHABEN, WD/O BHAICHAND KALYANJI, - Appellant(s)
Versus
MULKUNVERBA KANJI & 1 - Respondent(s)

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Appearance :
MR HARSHADRAI A.DAVE for MR SN SHELAT for Appellant(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5,1.2.6
Respondent(s) : 1,1.2.1 – 2 SERVED.

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 27/08/2007

ORAL JUDGMENT

This Appeal preferred under Section 100 CPC by the heirs and legal representatives of the plaintiff in Regular Civil Suit No.266/1979 arises from the

judgment and order dated 14th August, 1986 passed by the learned Assistant Judge, Morbi in Civil Appeal No.19/1984.

The Appeal is admitted on the following substantial question of law :-

"Whether in the facts and circumstances of the case, the lower appellate court was justified in raising the plea of limitation (adverse possession) against the plaintiffs when the defendants have not raised the plea of limitation (adverse possession) in the written statement and the parties' attention was not drawn on the said issue ?"

The above referred Regular Civil Suit No.266/1979 was instituted by the late Shri Bhaichand Kalyanji, the predecessor of the appellants, in the Court of Civil Judge (S.D.), Morbi for removal of encroachment and for recovery of possession of the suit premises. According to the plaintiff, he was the owner of the residential house named Mehta Bhuvan situated at Morbi. One of the rooms of the suit house

(store room) was leased to the defendant no.1 retaining the possession of the rest of the house (hereinafter referred to as, **"the suit premises"**) with the plaintiff. In absence of the plaintiff, the defendant no.1 – the tenant, her daughter – the defendant no.2 and her relative – the defendant no.3 trespassed into the rest of the house. Therefore, the suit.

The suit was contested by the defendants nos.1 and 2 by written statement Exh.17. According to the said defendants they were the lessees of the entire suit house and not merely of a store room as alleged.

The learned Civil Judge, by judgment and order dated 31st March, 1984, allowed the suit and passed decree for recovery of possession of the suit premises in favour of the plaintiff.

Feeling aggrieved, the defendants nos.1 and 2 preferred Civil Appeal No.19/1984 in the Court of Assistant Judge, Morbi. The learned Assistant Judge, by impugned judgment and order dated 14th August,

1986, confirmed the finding recorded by the learned Civil Judge. The learned Assistant Judge, however, was of the opinion that the trespass had occurred somewhere in the year 1963. The suit instituted in the year 1979 was, therefore, barred by limitation. The learned Assistant Judge accordingly allowed the appeal and set-aside the decree passed by the learned Civil Judge. Therefore, the present Appeal.

Though served the respondents have not entered appearance.

Mr.Dave has appeared for the appellants. He has submitted that it was the case of the plaintiff that the defendants had committed trespass in or around the year 1972. The suit instituted in the year 1979 was, therefore, well within the period of limitation. He has submitted that it was never the case of the defendants that the suit was barred by limitation. No issue in respect of maintainability of suit on the ground of limitation was framed by the learned Civil Judge. No evidence was led in that respect. In appeal before the lower appellate Court also, the defendants

nos.1 and 2 did not raise the question of limitation. Nevertheless, the learned Assistant Judge has, without any pleading or precise evidence on the point of limitation, raised and answered the question of limitation against the plaintiff. The learned Assistant Judge has thus committed material illegality in allowing the appeal preferred by the defendants only on the ground of suit being time-barred.

In support of his submission, Mr.Dave has relied upon the judgment of the Hon'ble Supreme Court in the matter of **The Municipal Corporation, Indore v/s. Niyamatulla (dead) by his legal representatives** [AIR 1971 SC 97]. In the said matter, the Hon'ble Supreme Court observed that, “**...if any special plea of limitation is a defence such a defence of limitation should be pleaded. In the present case, the Municipal Corporation did not plead Section 135 of the Indore Municipal Act, 1909 as a defence. Such a plea was not taken in the pleadings or in the trial Court and the District Judge should not have entertained such a plea.**”

There is no gain-saying that the defendants did not take the plea of limitation nor the learned Civil Judge addressed on the point of limitation. Even, in the appeal before the lower appellate Court, the defendants did not raise the point of limitation. In absence of a specific plea taken in the written statement and an opportunity to lead the precise evidence in respect of limitation, the learned Assistant Judge was not justified in raising the question of limitation, in answering the said question against the plaintiff and in allowing the appeal solely on the ground that the suit was time-barred. As recorded hereinabove, on merits the learned Assistant Judge confirmed the findings recorded by the learned Civil Judge. The learned Assistant Judge has observed that, "**...the evidence of the deft. is also not worth believing.**" He also observed that, "**...The learned trial Judge has rightly discussed the evidence of the witnesses of deceased deft., and has rightly arrived at the conclusion that Maniben has failed to prove that she has taken on lease the suit premises.**"

In view of the concurrent finding recorded by both the Courts below in favour of the plaintiff, this Appeal is allowed with cost throughout. The impugned judgment and order dated 14th August, 1986 passed by the learned Assistant Judge, Morbi in Civil Appeal No.19/1984 is quashed and set-aside. The judgment and decree dated 31st March, 1984 passed by the learned Civil Judge (S.D.), Morbi in Regular Civil Suit No.266/1979 is restored. Decree be drawn accordingly.

(Ms. R.M.Doshit, J.)

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